

Milstein, Adelman & Kreger, LLP
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Santa Monica, California 90405

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11 SABENA LAKSHMI KAMMULA,
12 individually and on behalf of all others
13 similarly situated,

14 Plaintiff,
15 vs.

16 KELLOGG COMPANY, a Delaware
17 corporation; KELLOGG USA, INC., a
Michigan corporation; KELLOGG
SALES COMPANY, a Delaware
corporation, and DOES 1 through 100,
inclusive,

18 Defendants.
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28 No. CV09-08102 (MMM) (RZx)

CLASS ACTION

[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION

Date: March 29, 2010
Time: 10:00 A.M.
Crtrm: 780
Judge: Hon. Margaret M. Morrow

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Plaintiff's Motion for Class Certification came on regular hearing on March 29,
3 2010 at 10:00 a.m., before the Margaret M. Morrow of the above captioned court.

4 The Court, having reviewed the briefs and evidence submitted by the Plaintiff
5 Sabena Lakshmi Kammula ("Plaintiff"), and Defendants Kellogg Company, Kellogg
6 USA, Inc. and Kellogg Sales Company (collectively, "Kellogg" or "Defendants"), the
7 oral arguments of counsel at the hearing, and all other matters on file herein, and good
8 cause appearing, the Court hereby GRANTS Plaintiff's Motion for Class
9 Certification. The Court hereby certifies two California classes under all three causes
10 of action in the Amended Complaint pursuant to Rules 23(a), 23(b)(2) and 23(b)(3)
11 defined as:

12 The Cocoa Krispies Class consists of:

13 All persons residing in the State of California who purchased
14 Cocoa Krispies for personal use and not for resale during the
15 time period June 2009 through the date of certification.

17 The Rice Krispies Class consists of:

18 All persons residing in the State of California who purchased
19 Rice Krispies for personal use and not for resale during the time
20 period June 2009 through the date of certification.

22 Excluded from the Class are Defendant's officers, directors, and employees, and any
23 individual who received renumeration from the Defendant to act as endorser of the
24 Kellogg's Immunity Cereal.

25 The Court further orders that Plaintiff Sabena Lakshmi Kammula is appointed
26 class representative and Milstein, Adelman & Kreger, LLP and Whatley, Drake &
27 Kallas, LLC are appointed class counsel.

28 Specifically, the Court finds:

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2 **A. LEGAL STANDARD**

3 All class actions in federal court must meet the following four prerequisites for
4 class certification:

5 (1) the class is so numerous that joinder of all members is
6 impracticable, (2) there are questions of law or fact common to
7 the class, (3) the claims or defenses of the representative parties
8 are typical of the claims or defenses of the class, and (4) the
9 representative parties will fairly and adequately protect the
10 interests of the class.

11 Fed. R. Civ. P. 23(a).

12 In addition, a plaintiff must comply with one of three sets of conditions set forth
13 in Rule 23(b). Under Rule 23(b)(1), a class may be maintained if there is either a risk
14 of prejudice from separate actions establishing incompatible standards of conduct or
15 judgments in individual lawsuits would adversely affect the rights of other members
16 of the class. Under Rule 23(b)(2), a plaintiff may maintain a class where the defendant
17 has acted in a manner applicable to the entire class, making injunctive or declaratory
18 relief appropriate. Finally, under Rule 23(b)(3), a class may be maintained where
19 common questions of law and fact predominate over questions affecting individual
20 members and where a class action is superior to other means to adjudicate the
21 controversy.

22 The decision to grant or deny class certification is within the trial court's
23 discretion. *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977). In doing so, a
24 trial court is only required to form a reasonable judgment. *Blackie v. Barrack*, 524
25 F.2d 891, 901 n.17 (9th Cir. 1975). In this regard, "[t]he court is bound to take the
26 substantive allegations of the complaint as true, thus necessarily making the class
27 order speculative in the sense that the plaintiff may be altogether unable to prove his
28 allegations." *Id.* The Court may require the parties to provide additional material from

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1 which the Court may make an informed judgment as to each requirement of class
 2 certification. *Id.*

3 **B. PLAINTIFF MEETS THE REQUIREMENTS OF RULE 23(a)**

4 **First**, the proposed class meets the numerosity requirement. “The prerequisite
 5 of numerosity is discharged if ‘the class is so large that joinder of all members is
 6 impracticable.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)
 7 (quoting Fed. R. Civ. P. 23(a)(1)).

8 Although the number of class members by itself is not dispositive, as a general
 9 matter, courts have found that the numerosity requirement is satisfied when class size
 10 exceeds 40 members. *See Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal.
 11 2000) (citations omitted). Other facts include geographical diversity, ability of
 12 individual claimants to institute separate suits, and whether injunctive or declaratory
 13 relief is sought. *Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir. 1982).

14 Here, the proposed class fulfills the numerosity requirement. The amount in
 15 controversy of this action exceeds \$5 million. Given that each box of Krispies Cereal
 16 costs around \$3.08 per box (wholesale), the class comprises many tens, if not
 17 hundreds, of thousands of California consumers.

18 **Second**, the Court finds that there are common issues of law and fact. Under
 19 Rule 23(a)(2), there must be questions of law and/or fact common to the proposed
 20 class. Courts have described the showing needed to meet the commonality
 21 requirement as “minimal” and “not high.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 22 1020 (9th Cir. 1998); *accord Mortimore v. FDIC*, 197 F.R.D. 432, 436 (W.D. Wash.
 23 2000).

24 In assessing commonality, “[t]he existence of shared legal issues with divergent
 25 factual predicates is sufficient, as is a common core of salient facts coupled with
 26 disparate legal remedies within the class.” *Hanlon*, 150 F.3d at 1019. Additionally,
 27 “[t]he commonality test is qualitative rather than quantitative – one significant issue

1 common to the class may be sufficient to warrant certification.” *Dukes v. Wal-Mart,*
 2 *Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007).

3 This case is based on uniform misrepresentations made prominently on every
 4 box of Kellogg’s Immunity Cereal sold to every class member. Accordingly, it is
 5 indisputable that the claims of all class members “stem from the same source.” *See*
 6 *Hanlon*, 150 F.3d at 1019-20. As such, the case can be boiled down to a few common
 7 issues that can easily be resolved according to class-wide proof:

8 Issue 1: Did Kellogg claim, on the label of each box, that the Products would
 9 “support your child’s immunity”?

10 Issue 2: Did Kellogg claim, on the label of each box, that the Products contain
 11 “25% daily value antioxidants & nutrient”?

12 Issue 3: At the time Kellogg made the Immunity Cereals and related
 13 representations on its labels (and in its other advertising), did Kellogg
 14 have the requisite competent and reliable scientific evidence to
 15 substantiate those claims?

16 Issue 4: Does Kellogg conduct constitute unfair competition and/or deceptive
 17 advertising under applicable law?

18 Issue 5: Should Kellogg be permanently enjoined and agree to provide
 19 restitution to California consumers?

20
 21 Accordingly, there is a common core of salient facts and legal issues. Thus, the Rule
 22 23(a)(2) commonality requirement is easily satisfied.

23 **Third**, the typicality element is satisfied. “The typicality prerequisite of Rule
 24 23(a) is fulfilled if ‘the claims or defenses of the representative parties are typical of
 25 the claims or defenses of the class.’” *Hanlon*, 150 F.3d at 1020 (*quoting* Fed. R. Civ.
 26 P. 23(a)(3)). “The test of typicality is whether other members have the same or similar
 27 injury, whether the action is based on conduct which is not unique to the named
 28 plaintiffs, and whether other class members have been injured by the same course of

1 conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *accord*
 2 *Dukes*, 474 F.3d at 1232.

3 The Court finds that Plaintiff’s claims are identical to the claims of the
 4 proposed Class. Plaintiff purchased and used the Immunity Cereals because she
 5 believed that the Products “help support [Plaintiff’s] child’s immunity”. *See*
 6 Kammula Decl., ¶ 6. Plaintiff’s claims pose the same questions of law and fact as
 7 the class members and arise from the same label claims that give rise to the claims of
 8 the other class members. Plaintiffs suffered the same injury - the loss of the purchase
 9 price and seek an injunction on behalf of all Class members. Accordingly, Plaintiff is
 10 well-suited to represent the Class and the typicality element is satisfied.

11 **Finally**, Plaintiff and her counsel are adequate. “The final hurdle interposed by
 12 Rule 23(a) is that ‘the representative parties will fairly and adequately protect the
 13 interests of the class.’” *Hanlon*, 150 F.3d at 1020 (quoting Fed. R. Civ. P. 23(a)(4)).
 14 “Resolution of two questions determines legal adequacy: (1) do the named plaintiffs
 15 and their counsel have any conflicts of interest with other class members and (2) will
 16 the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
 17 class?” *Id. See also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th
 18 Cir. 1978); *Hanlon*, 150 F.3d at 1021; *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir.
 19 1994).

20 Based upon the evidence submitted, the Court finds Plaintiff and her counsel do
 21 not have any conflicts of interest with the proposed class. The Court further finds
 22 Plaintiff and her counsel will vigorously prosecute this action and have the resources
 23 to do so.

24 **C. CERTIFICATION UNDER RULE 23(b)(2) IS APPROPRIATE.**

25 Pursuant to Rule 23(b)(2), a class action is proper where “the party opposing
 26 the class has acted or refused to act on grounds generally applicable to the class,
 27 thereby making appropriate final injunctive relief or corresponding declaratory relief
 28 with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). The standard for

1 certification is minimal, as “[i]t is sufficient if class members complain of a pattern
2 or practice that is generally applicable to the class as a whole[, e]ven if some class
3 members have not been injured by the challenged practice.” *Walters v. Reno*, 145
4 F.3d 1032, 1047 (9th Cir. 1998). Although common issues must predominate for class
5 certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). *Id.*

6 The court finds that certification under Rule 23(b)(2) is appropriate. Based on
7 the evidence submitted, the court finds that Plaintiff and the class complain of a
8 standard and uniform practice of fraudulent and false claims appearing on the
9 label of the Immunity Cereals that is generally applicable to the Class as a whole.

10 Plaintiff has demonstrated that her primary goal in bringing this action is to
11 obtain injunctive relief and stop Kellogg’s false and misleading label claims
12 regarding. *See Kammulla Decl.*, ¶ 12-13. Plaintiff wants to make sure that the
13 labels for the Immunity Cereals are accurate so that users of the Product can
14 know what they are buying and putting in their bodies. *Id.*

15 The damages component of the claims in this case, though substantial, is
16 secondary to the goal of stopping the false labeling and ensuring Defendants do not use
17 such false statements on the cereal boxes in the future. Compare *Dukes*, 474 F.3d at 1235
18 (a suit by current and former employees for gender discrimination was primarily
19 motivated by the desire to protect those class members); *Molski v. Gleich*, 318 F.3d 937,
20 950 (9th Cir. 2003) (primary goal was to end practice of disability discrimination by
21 owner and operator of service stations).

22 The Court finds that Plaintiff’s pre-litigation letter pursuant to California’s
23 Consumer Legal Remedies Act (Cal. Civil Code §1750, *et. seq.*), and her requests for
24 specific forms of injunctive relief in both her original Complaint and First Amended
25 Complaint, demonstrate the Plaintiff’s primary goal for this action is specific
26 injunctive relief with respect to Kellogg’s Products’ labeling and advertising. *See*
27 Amended Complaint, Exh. A (“CLRA Letter”); *see also* Amended Complaint at ¶ 79.

28 Thus, the Court certifies a Rule 23(b)(2) class.

1 **D. CERTIFICATION UNDER RULE 23(b)(3) IS APPROPRIATE.**

2 The Court further certifies the class under Rule 23(b)(3). “Subdivision (b)(3)
 3 encompasses those cases in which a class action would achieve economies of time,
 4 effort, and expense, and promote uniformity of decision as to persons similarly
 5 situated, without sacrificing procedural fairness or bringing about other undesirable
 6 results.” *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 211 (9th Cir. 1975) (quoting
 7 Committee notes). A class action may be certified where common questions of law
 8 and fact predominate over questions affecting individual members and where a class
 9 action is superior to other means to adjudicate the controversy. Fed. R. Civ. P.
 10 23(b)(3).

11 Here, the Court finds that common issues of law and fact predominate. The
 12 “predominance inquiry tests whether proposed classes are sufficiently cohesive to
 13 warrant adjudication by representation.” *Amchem Prods. v. Windsor*, 521 U.S. 591,
 14 623 (1997). The Court must rest its examination on the legal or factual questions of
 15 the individual class members. *Hanlon*, 150 F.3d at 1022. “To determine whether
 16 common issues predominate, this court must first examine the substantive issues
 17 raised . . . and second inquire into the proof relevant to each issue.” *Jiminez v.*
 18 *Domino’s Pizza, Inc.*, 238 F.R.D. 741, 251 (C.D. Cal. 2006) (citing *Simer v. Rios*, 661
 19 F.2d 655, 672 (7th Cir. 1981)).

20 This Court finds, however, that common questions of law and fact predominate
 21 over individual questions of reliance. In *Vasquez v. Superior Court*, 4 Cal. 3d 800, 814
 22 (1971), the California Supreme Court found that if the plaintiffs “can establish without
 23 individual testimony that the representations were made to each plaintiff and that they
 24 were false, it should not be unduly complicated to sustain their burden of proving
 25 reliance thereon as a common element.”

26 At this stage, the Court need only form a reasonable judgment as to this issue.
 27 *Id.* Here, Plaintiff has provided sufficient evidence to demonstrate that she may be
 28 able to prove the false representations at trial. Plaintiff has alleged that the product

1 specific representations were made on the product label. These labels alone would
2 constitute written representations to purchasers. Further, Plaintiff has provided
3 sufficient evidence that the claims made by Defendants on the Immunity Cereals
4 product label are unsubstantiated and therefore presents a genuine, significant,
5 common issue for the trier of fact. This issue will be proven for every purchaser with
6 the same common evidence.

7 Moreover, in *In re First Alliance Mortgage Co.*, 471 F.3d 977, 989-91 (9th Cir.
8 2006), the Ninth Circuit upheld the district court's class certification of borrowers
9 alleging consumer fraud. The defendant, First Alliance, argued that class certification
10 was inappropriate because each class member would be required to demonstrate that
11 First Alliance's representations "were conveyed to borrowers in a uniform manner and
12 that the uniform misrepresentations came directly from the written, standardized sales
13 pitch." *Id.* at 990.

14 Rejecting First Alliance's argument, the Ninth Circuit found that it "is the
15 **underlying scheme** which demands attention. Each plaintiff is similarly situated with
16 respect to it, and it would be folly to force each bond purchaser to prove the nucleus of
17 the alleged fraud again and again." *Id.* at 991 (emphasis added). The relevant test is
18 whether fraud claims stem from a "common course of conduct." *Id.* at 990 (quoting
19 *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) ("Confronted with a class of
20 purchasers allegedly defrauded over a period of time by similar misrepresentations,
21 courts have taken the common sense approach that the class is united by a common
22 interest in determining whether a defendant's course of conduct is in its broad outlines
23 actionable, which is not defeated by slight differences in class members' positions.")).

24 Furthermore, with regard to reliance, the *Vasquez* Court explained that:

25 The rule in this state and elsewhere is that it is not necessary to show
26 reliance upon false representations by direct evidence. The fact of
27 reliance upon alleged false representations may be inferred from the
28 circumstances attending the transaction which oftentimes afford much

1 stronger and more satisfactory evidence of the inducement which
2 prompted the party defrauded to enter into the contract than his direct
3 testimony to the same effect. . . . The requirement that reliance must be justified
4 in order to support recovery may also be shown on a class basis. If the court
5 finds that a reasonable man would have relied upon the alleged
6 misrepresentations, an inference of justifiable reliance by each class member
7 would arise. It should be noted in this connection that a misrepresentation may
8 be the basis of fraud if it was a substantial factor in inducing the plaintiff to act
9 and that it need not be the sole cause of damage.

10 *Vasquez*, 4 Cal. 3d at 972, 973 n.9 (internal quotations omitted; emphasis supplied).

11 The Court finds that here, similar to *First Alliance*, and as in *Vazquez* common
12 issues with respect to Kellogg's conduct predominate over any individual issues.

13 Finally, the Court finds that a class action is superior to individual suits. "A
14 class action is the superior method for managing litigation if no realistic alternative
15 exists." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The
16 following matters are pertinent to the finding of superiority:

17 (A) the interest of members of the class in individually controlling the
18 prosecution or defense of separate actions; (B) the extent and nature of any
19 litigation concerning the controversy already commenced by or against
20 members of the class; (C) the desirability or undesirability of concentrating
the litigation of the claims in a particular forum; (D) the difficulties likely
to be encountered in the management of the litigation.

21 Fed. R. Civ. P. 23(b)(3)(A)-(D).

22 First, this Court notes that no realistic alternative exists in this case and that
23 class members would likely prefer to pursue this matter as a class action given that the
24 products sell for approximately \$3.08. This is likely not substantial enough to warrant
25 individual actions. Additionally, this is an appropriate forum for the litigation. Fourth,
26 the Court concludes that a California class action pursuant to Rule 23(b)(3) is
27 manageable.

28 Thus, the Court finds that that superiority argument is satisfied.

E. THE COURT APPOINTS SABENA LAKSHMI KAMMULA AS CLASS REPRESENTATIVE AND MILSTEIN, ADELMAN & KREGER, LLP AS CLASS COUNSEL.

The Court also appoints Plaintiff Sabena Lakshmi Kammula as representative for the above class. Finally, the Court appoints Milstein, Adelman & Kreger, LLP (“MAK”) as class counsel pursuant to Fed. R. Civ. P. 23(g).

F. CONCLUSION

For the aforementioned reasons, the Court certifies the following class pursuant to Federal Rule of Civil Procedure 23:

- (1) a California Rule 23(b)(2) fraud class for injunctive relief;
- (2) a California Rule 23(b)(3) UCL (Cal. Bus. & Prof. Code §17200 et seq.) Class;
- (3) a California Rule 23(b)(3) CLRA (Cal. Civil Code §1750 et seq.) class;
- (4) a California Rule 23(b)(3) FAL (Cal. Bus. & Prof Code §17500 et seq.) Class;
- (5) Plaintiff Sabena Lakshmi Kammula is appointed class representative;
- (6) Milstein, Adelman & Kreger, LLP and Whatley, Drake & Kallas, LLC are appointed class counsel

IT IS SO ORDERED.

DATED:

Hon. Margaret M. Morrow
Judge of the United States District Court